

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA  
SAVANNAH DIVISION

KENNETH WAITHE and LINDA WAITHE,	:	Case No. CV409-021
Individually and on behalf of All	:	
Others Similarly Situated,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
ARROWHEAD CLINIC, INC., ARROWHEAD	:	
MANAGEMENT, INC., HARRY W. BROWN,	:	
INC., H. BROWN MANAGEMENT, LLC,	:	
HARRY W. BROWN, JR., LEGAL COUNSEL,	:	
INC., ROBERT D. STEIN, and ROBERT	:	
D. STEIN d/b/a ROBERT D. STEIN &	:	
ASSOCIATES,	:	Savannah, Georgia
	:	June 1, 2009
Defendants.	:	4:02 p.m.
_____	:	

MOTION HEARING  
BEFORE THE HONORABLE LISA GODBEY WOOD  
United States Chief District Judge

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P R O C E E D I N G S

(Call to Order at 4:02 p.m.)

THE COURT: Good afternoon. Call the case.

THE CLERK: Kenneth and Linda Waithe versus Arrowhead Clinic, et al. Brent Savage and Jeremy McKenzie for the Plaintiffs; Mason White, James Grant, Tracy Elliott, and John Rogers for the Defense.

THE COURT: Are we ready for the Plaintiffs?

MR. SAVAGE: Yes, Your Honor.

THE COURT: Ready for the Defense?

MR. GRANT: Yes, Your Honor.

MR. ROGERS: Yes, Your Honor

THE COURT: I had originally had this scheduled for a status conference, as you gentlemen know. And you may have a seat. I have recently received a dozen or so Savannah cases, so I came to get acquainted with each case and look at the pending motions. And I note front and center pending in this case is a motion to remand.

Before I get to consideration of the motion to dismiss and so forth, I think we need to make sure that it is properly in federal court. So we converted this afternoon's session into a hearing on the motion to remand.

I will hear from the Movant.

MR. SAVAGE: We are the Movant in this case. To quote Johnnie Cochran, "If it doesn't fit, it must acquit,"

1 you have a parallel here. You have to throw this case out  
2 if it doesn't -- I forget how I was going to have that  
3 rhyme. I lost it there.

4 THE COURT: We will imagine the carefully  
5 constructed argument you have.

6 MR. SAVAGE: I represent the Waithes, who are the  
7 Plaintiffs in this case that was filed in the State Court of  
8 the Liberty County. It was removed by the Defendants in the  
9 case roughly thirty days after they acknowledged service in  
10 the case.

11 If there is any doubt as to whether or not this  
12 Court should keep this case, then the law says that it  
13 should mitigate towards remanding the case back to the State  
14 Court of Liberty County. And the burden is on the moving  
15 party, in this case Harry Brown, Sr., who we have dismissed  
16 from the case. We dismissed him after they removed the  
17 case, but he is no longer a party in this case because we  
18 dismissed him prior to answer.

19 THE COURT: I will tell you, Mr. Savage, what I  
20 have my eye on in particular -- and I have, of course, read  
21 all your submissions -- is the amount in controversy and a  
22 few subset issues within that that I want to hear from you  
23 on. Let me tell you what they are, and then you can say  
24 what you like.

25 MR. SAVAGE: I'm ready to go.

1           THE COURT: But I would invite you to focus on  
2 these things. I do want to have you address what the  
3 particular standard that I look at when trying to figure out  
4 whether the amount in controversy is sufficient under CAFA,  
5 whether that is a legal certainty or what. I do want to  
6 hear from both parties on the standard.

7           I also want to hear your argument on whether I  
8 consider the affidavits that the Defendants submitted as a  
9 part of their initial removal papers.

10           And then as far as looking at and tallying the  
11 amount in controversy, whenever you meet it, and whether the  
12 attorneys' fees requested go into that calculus or not.

13           MR. SAVAGE: I think they do. We've pled it,  
14 though, that there's not \$5 million in controversy in the  
15 aggregate in this case. So we've agreed to cap our damages  
16 at that level. So I think we are under the level for  
17 damages here.

18           THE COURT: But it would be the Plaintiffs'  
19 contention that the amount in controversy includes  
20 attorneys' fees?

21           MR. SAVAGE: Yes. Absolutely. They will tell you  
22 that they don't think this is much of a case, that we're not  
23 fighting about a lot of money; that they refunded the money  
24 after they saw the affidavit of Shelah Gibbs in a related  
25 case that is up in front of the Supreme Court of Georgia.

1           Shelah Gibbs is an ex-employee. She's kind of the  
2 Mark Felt of this case, the "deep throat," who used to work  
3 for Harry Brown et al, and says that -- she lays out the  
4 scheme that they have which is what they do is they retain  
5 certain lawyers who are there to collect their bills. And  
6 then they have a scheme where the client doesn't know about  
7 it as far as the volume of business that is given to these  
8 select lawyers.

9           But what they do in order to collect more money --  
10 and did until they saw the affidavit of Shelah Gibbs, is  
11 they did this: They would send clean bills to their select  
12 lawyers, which means that they would collect money under  
13 either PIP, Med Pay, or other sources. I've given you what  
14 they did up there as an example of what they did in the  
15 Waithe case. And then they paid the money back.

16           They shouldn't be talking about removal. They  
17 ought to be in jail if Miss Gibbs is correct.

18           THE COURT: Let's go ahead to the remand issues.

19           MR. SAVAGE: Okay. The key is whether or not you  
20 believe Brown when he -- the Defendant in the first case --  
21 says he is a resident of Georgia at the time he answered the  
22 case in '06, or you believe him when he gives sworn  
23 testimony in this case that he has been a resident of  
24 Florida since '01. I think you've got to construe that  
25 against him.

1           We put it as Exhibit 5 his answer in the case of  
2     *Toler versus Brown, et al.* Under the basic law, you  
3     construe his answers against him.

4           Now Alston & Bird got him in this case. That was  
5     a poor choice of words. I don't think that they did  
6     anything other than Mr. Brown is saying that they should do,  
7     or Dr. Brown, but he forgot that he had already pled in the  
8     State Court in front of Judge Coolidge of Chatham County  
9     that he admitted that he was a resident of Georgia in '06.

10           Now he files an affidavit in this court that says  
11     -- and in his deposition -- that he was a resident of  
12     Florida in '01 because they want to come to Federal Court.  
13     They don't want to be in the State Court of Liberty County.

14           What I would urge you to look at is your  
15     discretion in this. First, I think they're gone under the  
16     fact that there's contradictory testimony in the record from  
17     Brown, Sr. who is the only basis for them to remove this  
18     case to Federal Court. He's the only basis to do that in  
19     this case.

20           THE COURT: At the time of removal, what was the  
21     status of Mr. Brown?

22           MR. SAVAGE: I guess you would say he was a  
23     resident of Florida. But that is contradicted by the fact  
24     that he says that he is -- since '01, he was a resident of  
25     Florida in this case. And that's contradicted by him saying

1 that in '06 he was a resident of the State of Georgia.

2 We took his deposition on February 26th, 2009, and  
3 he said he had been in the State of Georgia since December  
4 20th of 2008. We would submit to you this is a ruse because  
5 they're judge shopping in this case. That's what it's  
6 about.

7 But you have discretion in this case. Even under  
8 the class action fairness standards that was put through by  
9 the previous administration in the last several years, you  
10 have discretion to look at these things.

11 Is this a federal case? We're not talking about  
12 any federal law in this case. That's one of the things  
13 you're supposed to look at.

14 Does this claim involve national interest, this  
15 scheme that the chiropractors and the lawyers are putting  
16 together here? No.

17 Was the action originally brought to avoid federal  
18 jurisdiction? No. We didn't bring it that way. We  
19 couldn't conceive of a way that would bring it into Federal  
20 Court having known and relied on answers in the *Toler* case  
21 that said he was a resident of Georgia. We couldn't  
22 conceive of a way that they could do it.

23 Does the original action have nexus with that  
24 court? I mean, this is where the whole scheme unfolded  
25 where they get a call in from the Waithes, they fax to the



1 Stein Law Firm information on the Waithes without their  
2 permission. The Stein Law Firm gets a runner to go to  
3 Hinesville, Georgia so that they can recruit the Waithes to  
4 sign up.

5 The Waithes are hurt in a car wreck, and they're  
6 told they'll get no treatment unless they sign up with  
7 Stein. Everything in this scheme occurs in Liberty County.  
8 They want us to be here with no national interest or no  
9 federal law involved.

10 The last thing where you have discretion is  
11 whether or not the putative class are mainly Georgia  
12 residents. Maybe with a few exceptions, they're not.  
13 That's why I think you have discretion to kick it out.

14 THE COURT: Look at the declaration that the  
15 Defendants provided. They total up -- I think it is about  
16 \$9 million. Why is that not correct?

17 MR. SAVAGE: I can only tell you what they tell  
18 me, that this case is not even worth my time. I don't think  
19 that the \$9 million is accurate.

20 THE COURT: What is inaccurate about it?

21 MR. SAVAGE: If you look at Shelah Gibbs'  
22 affidavit, she says that "I was the billing clerk." What  
23 they did is they really have two sections of the state.  
24 They have Savannah and Atlanta. She said, "We had more than  
25 a million dollars of these overpayments where we pocketed

1 money from the insurers but never showed the client that we  
2 were pocketing the money, the chiropractors in this case.

3 She estimates that amount at about a million -- a  
4 little north of a million. She estimates, I think, \$234,000  
5 in overpayments in the Savannah section. They can't make  
6 payments back in the Atlanta section very well because  
7 they've swept up their books.

8 In Savannah, they've made payments back once they  
9 see Gibbs' affidavit. And that's 234,000 bucks. The quick  
10 math will put it at a million five. Plus, we're entitled to  
11 interest on this.

12 It is the most elaborate heinous scheme done by  
13 lawyers I have ever seen, and I have seen a few around here.

14 If they think it's \$9 million -- I don't think  
15 that jurisdictional amount controls because I think you've  
16 got to look at these things. You've got to look at the fact  
17 that Brown is saying one thing in the *Toler* court and he's  
18 saying another thing here. They will point out that's not  
19 when the declaration was filed.

20 They are served with the complaint on December the  
21 1st, and they'll say that that service is no good. But if  
22 you look at the statute that says when you have to remove a  
23 case, it says when you are served or otherwise given the  
24 complaint. That's probably not our best argument in this  
25 case, but it's a setup. They came in and said, "Well, you

1 say we can say we were served as of the 30th," and then they  
2 come in and remove the case later.

3 This case has nothing to do with this federal  
4 courthouse -- nothing at all. They just want to be here.

5 THE COURT: Let me hear from the other side of the  
6 aisle, and then I will give you the last word.

7 Mr. McKenzie?

8 MR. McKENZIE: I'm just going to sit here and stay  
9 in the background --

10 THE COURT: Moral support?

11 MR. McKENZIE: -- with moral support is a good way  
12 to put it.

13 THE COURT: All right. From the Defense?

14 MR. GRANT: Your Honor, Jim Grant for the Defense  
15 here.

16 What I wrote down that you wanted to talk about --  
17 I'm not sure that Mr. Savage expressly addressed it, but I'm  
18 happy to talk about what you were interested in. I think  
19 what you were focused on, first of all, is: Are we under a  
20 preponderance of the evidence standard or a legal certainty  
21 standard given that they've said there's not more than \$5  
22 million in controversy in this case?

23 By the way, of course, that means they did plead  
24 the case to avoid federal jurisdiction. That's why that  
25 sentence is in this case. And there is no answer in the

1 Eleventh Circuit under CAFA. There is pre-CAFA guidance on  
2 it which suggests a legal certainty is what's required here.

3 I think we said in our papers, Your Honor, I think  
4 it's the Third and the Ninth Circuit that have ruled that  
5 the legal certainty standard applies when a plaintiff says,  
6 "I seek no more than \$5 million in a CAFA case." But the  
7 Eighth Circuit has come out to the opposite effect and has a  
8 preponderance of the evidence standard in effect here.

9 If I were to guess and predict for a case to go up  
10 to the Eleventh Circuit, given what the law was on non-CAFA  
11 diversity of jurisdiction, I'll bet it's legal certainty.  
12 But I don't know, and someone is going to argue it some day,  
13 and we'll find out.

14 THE COURT: We may find out in this case.

15 MR. GRANT: Right. But if I were a betting man,  
16 that's where I'd put my twenty-five cents. Absolutely.

17 I think we meet that standard. It's why we went  
18 to the lengths that we went to in this removal. Many of my  
19 removals are much more bare bones than the removal petition  
20 that we filed in this case because I was concerned about  
21 that very issue.

22 The second thing you've asked about which Mr.  
23 Savage didn't address is -- actually, I spent a lot of time  
24 in the past few days thinking about this. It's very  
25 interesting. I think I know where Your Honor is going.

1           And that is, under Judge Tjoflat's decision in  
2     *Lowery*, can you look at the Brown declaration or not? And  
3     I'll tell you, I found it over the weekend. It's not been  
4     cited. There's a case down in Florida where a District  
5     Court judge has said you cannot. I think it was a woman  
6     judge, Your Honor. I think she said -- actually, there were  
7     two decisions.

8           THE COURT: It has to be supplied by the Court or  
9     the plaintiff.

10          MR. GRANT: Exactly. You've got it. And that's  
11     how she read *Lowery*.

12          And I have really thought hard about this. There  
13     are two Eleventh Circuit decisions that pre-date *Lowery*, the  
14     *Sierminski* -- I'm pronouncing it wrong -- and *Best Buy*.

15          THE COURT: Right, a panel decision.

16          MR. GRANT: Yes -- that say you absolutely can  
17     look at summary judgment type evidence.

18          And in one of the footnotes in that monster of a  
19     decision that Judge Tjoflat wrote -- it's forever -- he says  
20     that there are some circumstances where you can look at the  
21     defendant introduced evidence. I can tell you the footnote  
22     if Your Honor cares about it, but it's in there. He talks  
23     about you can actually look at contract damages and the  
24     defendant could submit evidence under a contract, for  
25     example.

1           So it really is an open question. I don't  
2 understand how -- and I don't think the law is to this  
3 effect -- one panel can't overrule another. So we've got  
4 one panel saying in CAFA you can't look at evidence, and  
5 we've got other panels saying in the old \$75,000 removal  
6 regime you can. I don't know why there's a difference.

7           THE COURT: Does the fact that one is CAFA and one  
8 not change the prior panel rule?

9           MR. GRANT: You know, what I've been struggling  
10 with is: Is there a distinction that -- of course, there's  
11 a distinction.

12          THE COURT: Right. But does it matter?

13          MR. GRANT: Is it a distinction with a difference?  
14 I can't come up with a difference.

15          THE COURT: What about the general policy aims of  
16 CAFA versus non-CAFA cases?

17          MR. GRANT: Of course, CAFA was meant to  
18 liberalize federal jurisdiction and make it easier for a  
19 defendant to remove.

20          THE COURT: Which differs from --

21          MR. GRANT: Correct. It's the exact opposite.  
22 And in regular old -- I'll call it \$75,000 diversity  
23 jurisdiction -- it's the exact opposite.

24          THE COURT: Which may be a distinction with a  
25 difference.

1 MR. GRANT: Could be. I hadn't thought about it  
2 from that perspective.

3 One of the things that did dawn on me, though, is  
4 why would it be that for the amount in controversy I can't  
5 submit defendant-oriented evidence? But what about  
6 citizenship?

7 What Judge Tjoflat said is you've got to get the  
8 proof from the plaintiff. That's essentially how the judges  
9 down in Florida read it.

10 Well, how am I ever going to learn from the  
11 Waithes what state Attorney Stein is a resident of? The  
12 only way to prove that is through Stein. How am I ever  
13 going to learn from the Plaintiffs that there's more than a  
14 hundred people in this case? The only way to prove that is  
15 through my guys.

16 The other elements you have to prove -- you can  
17 have defense-oriented evidence but not the amount in  
18 controversy? I mean, again, I don't see why you would say  
19 it's okay for Stein to say, "I live in South Carolina." And  
20 that doesn't come from a defendant -- I mean -- from a  
21 plaintiff. And it's okay for me to say there were  
22 twenty-two hundred patients that we've looked at our records  
23 that were both Arrowhead Clinic patients and represented by  
24 Stein. These folks would never know that. They would not  
25 be competent to give that proof.

1           But when it comes to what's at stake, you're  
2 solely limited to look at what comes from plaintiff. That  
3 just doesn't make sense. And none of the other circuits, by  
4 the way, do that. It's interesting. The other circuits  
5 we've seen in CAFA allow you to submit evidence from the  
6 defendant in trying to establish jurisdiction under CAFA.

7           The Eleventh Circuit stands alone in this one  
8 decision. And I don't know how it stands in light of the  
9 prior decisions in *Best Buy*.

10           In fact, Judge Tjoflat ironically cited in a CAFA  
11 decision *Best Buy* with approval. But he tries to  
12 distinguish it by saying, "Well, we didn't confront the  
13 issues squarely." They looked at evidence, an amount in  
14 controversy in CAFA from a defendant, and said it's  
15 insufficient. But nobody raised: Was it proper to do this?  
16 But they tacitly approved that procedure, but it wasn't hit  
17 square on.

18           But there's a decision under CAFA looking at  
19 defendant-introduced evidence. I can tell you what it is  
20 right now. It is the *Evans* case, Your Honor -- we cited it  
21 to you -- where they do that -- excuse me. It's the *Miedema*  
22 case -- *Miedema*. And we cited that case to you.

23           And they look at, "Defendant introduced evidence  
24 on the amount in controversy under CAFA," and cite *Best Buy*  
25 with approval.



1           So being completely straight with Your Honor, it's  
2     confusing admittedly. I think what we're saying is the  
3     better side of this and the right way to look at it from a  
4     consistency standpoint is if you can introduce evidence on  
5     citizenship or the number of plaintiffs, and you can do so  
6     in the old diversity context, why in the world would there  
7     be this little exception for the \$5 million issue under  
8     CAFA.

9           I think the weight of authority is with us on  
10    that.

11           THE COURT: Assuming that we do consider the  
12    affidavit then, help me line up what it enumerates with what  
13    the Plaintiff is actually seeking.

14           MR. GRANT: Okay. Sure.

15           THE COURT: Because I am not sure that there is  
16    necessarily such a fit.

17           MR. GRANT: Okay. There's two classes in this  
18    case. Mr. Savage devoted most of his comments to this Class  
19    B, which has to do with the monies my clients allegedly held  
20    on to too long and then refunded after the fact and some  
21    interest claims.

22           There's also class A. If you read the prayer for  
23    relief in the original complaint, he seeks disgorgement of  
24    all attorneys' fees and all medical payments. If you look  
25    at the actual prayer for relief, that is on page 14 of the

1 original complaint. That's what it seeks as a remedy in  
2 this case.

3 And that's why we say, "Okay. If you seek  
4 disgorgement" -- there were \$9 million in medical payments  
5 to all these folks. That's our first example we gave you in  
6 the affidavit that were both clients of the Stein firm and  
7 patients of Arrowhead. That's example or bucket one.

8 Bucket two was: Well, what about the folks that  
9 have resolved their personal injury case, which is a subset  
10 of that nine? Those folks, where they've resolved their  
11 personal injury case and have payments to the Arrowhead  
12 Clinics, is \$7.3 million.

13 Then when you talk about what's the actual funds  
14 received by my clients in those resolutions, it's \$3.1  
15 million. That's the third example where we do have to go to  
16 aggregation which Your Honor was asking about earlier. I do  
17 think the law is fairly clear -- and Mr. Savage admitted as  
18 much -- that you put in attorneys' fees and you can  
19 aggregate punitive damages which they also seek.

20 And you remember, I'm sure, Your Honor, from your  
21 days when you were, long ago, a practicing lawyer, that the  
22 Supreme Court of Georgia long ago ruled under the *Bagley*  
23 *versus Short* decision that the \$250,000 cap is per  
24 plaintiff. So there's not an issue that it would only be a  
25 \$250,000 award.

1           And we've got at least 1,700 patients, according  
2     to the Brown declaration, at issue. If they just got a  
3     thousand dollar punitive damage award, that's \$1.7 million.  
4     If they get a two thousand dollar punitive damage award,  
5     that's \$3.4 million.

6           I mean, you don't have to conjure up images of a  
7     run-away wacky punitive damage award to aggregate with some  
8     modest attorneys' fees plus the \$3.1 million that was paid  
9     to my clients through resolution of these personal injury  
10    claims to easily exceed the \$5 million threshold.

11          We don't have this proof. So I recognize, Your  
12    Honor, that this is silent in the record.

13          But let me just make a footnote. They're also  
14    seeking disgorgement of the lawyers' fees. Now there is no  
15    proof in front of you, but that's at stake too, and that's  
16    going to be a lot of dough as well. I think we get there on  
17    our proof alone, of course. That's just disgorgement of the  
18    medical payments.

19          But they're also seeking disgorgement of the fees  
20    that they paid to Stein. The example here with the Waithe's  
21    was about four thousand dollars, I think, three thousand  
22    dollars to four thousand dollars for Mrs. Waithe and three  
23    to four thousand dollars for Mr. Waithe. Times seventeen  
24    hundred Plaintiffs. Again, you're up into the multiple  
25    million dollars range without really batting an eye.

1           So I think, going back to where we started, that  
2           when and if the Eleventh Circuit gets around to deciding  
3           this legal certainty, it's probably going to say that that's  
4           the burden we're in here on today. I think we, on purpose,  
5           assumed that and submitted proof to try and chin to that  
6           burden.

7           I think that reconciling *Lowery* with *Sierminski*  
8           and *Best Buy* in the other circuits, it is appropriate for  
9           Your Honor to consider the declaration. The diversity of  
10          citizenship issue is a non-issue. Post-removal acts don't  
11          matter, and Stein is diverse anyway. He's a South Carolina  
12          citizen. Whether Brown is Florida or Georgia, Stein is from  
13          South Carolina and the Waithes are from Georgia.

14          So we only need minimal diversity. I think that's  
15          kind of a red herring candidly, Your Honor. That's what  
16          CAFA requires.

17          Last but not least, this discretionary local  
18          controversy exception that exists in the statute, unlike the  
19          burden I bear, they bear that burden. And they've got to  
20          show the states from which more than one-third but less  
21          two-thirds of the class members resided.

22          And there's case law in Georgia -- excuse me -- in  
23          the Eleventh Circuit already. We've cited it to Your Honor.  
24          And they find that the Plaintiffs have not met their burden  
25          because it's rank speculation about where, for example, the

1 citizenship is of Plaintiffs. And this record is absolutely  
2 silent on that issue. It's silent on all of those issues,  
3 candidly. But it's silent on that very simple what is the  
4 one-third/two-thirds shake out of the Plaintiffs' proposed  
5 class.

6 So unless Your Honor has additional questions, I  
7 will just close with that. I think that --

8 THE COURT: Disgorgement of the medical liens  
9 alone for the Class A represents how much?

10 MR. GRANT: \$9 million.

11 THE COURT: Without the attorneys' fees?

12 MR. GRANT: Nine or seven -- oh, I'm sorry. \$3.1  
13 million. \$3.1 million.

14 Well, if it's a medical lien, 3.1 is the money we  
15 got. The charges were 9 million for everybody, 7 million  
16 for those who resolved their claims. So it could easily be  
17 the seven and the nine.

18 THE COURT: But let's look at legal certainty.  
19 You are certain of 3.1 million in controversy?

20 MR. GRANT: Absolutely. That's cash. That's  
21 cash.

22 THE COURT: How do you get the remaining 1.9 to a  
23 degree of legal certainty?

24 MR. GRANT: Fees and punitive damages. Under  
25 removal jurisprudence, you have to assume the Plaintiff is

1 going to win. I get that presumption in my favor.

2 Well, to get that presumption, it's not very hard  
3 to assume that a one-third attorneys' fee is a million  
4 bucks. It's probably higher, although I don't have his fee  
5 contract.

6 I gave you two examples. \$1,000 or \$2,000 per  
7 Plaintiff in punitive damages.

8 THE COURT: That is a rational estimate that you  
9 are giving?

10 MR. GRANT: Yes, ma'am.

11 THE COURT: But, again, if the standard is legal  
12 certainty, how do we --

13 MR. GRANT: But I don't know how I could ever do  
14 that as a Defendant. You're never going to know to a legal  
15 certainty until a jury awards those punitive damages.

16 THE COURT: Well, you would do it, for example, if  
17 disgorgement had been 6 million as opposed to 3.1.

18 MR. GRANT: Yes.

19 THE COURT: Then you would file your affidavit  
20 with your removal papers and the affiant would swear that it  
21 was \$6 million, and that would be a legal certainty.

22 Here we have a 3.1 million legal certainty for  
23 disgorgement. My question is: How do you bridge the gap,  
24 the difference, between 5 and 3.1 to a legal certainty?

25 MR. GRANT: Understood. For purposes of today, I

1 don't know what I can -- with respect to punitive damages, I  
2 don't know how I could ever have proof to a legal certainty,  
3 other than that they're sought.

4 THE COURT: The answer may be that you may not --  
5 you, particularly. But there could be a defendant who has  
6 the capacity. Like I just said, if it was \$6 million in  
7 disgorgement.

8 MR. GRANT: Absolutely. I'm saying if I'm in the  
9 \$3.1 million bucket and I need the punitive damages -- I  
10 can't say six, for example -- I'm not sure how to a legal  
11 certainty you can other than be rational because how do you  
12 know, right?

13 THE COURT: You may not be capable of showing it  
14 to a legal certainty.

15 MR. GRANT: In that particular bucket. But they  
16 seek disgorgement of the medical liens. Those are going to  
17 be for the services rendered, not just the cash that changed  
18 hands between the Stein firm and the Arrowhead Clinic. And  
19 that's either the \$7.3 million number or the \$9 million  
20 number.

21 Now if they want to change their prayer for  
22 relief -- well, they can't do that either because it's time  
23 of removal that is the snapshot in time that we're looking  
24 at. And the law is very clear on that.

25 As an aside, they fought this fight. We only did

1 the appeal of the underlying State Court case. And they  
2 sought disgorgement in the State Court case and the  
3 companion one that preceded this as well until they  
4 dismissed it because of jurisdictional reasons in the State  
5 Court.

6 THE COURT: Do you have your affidavit handy?

7 MR. GRANT: Yes, I do.

8 THE COURT: Let me take a look.

9 MR. GRANT: (Hands document)

10 THE COURT: (Pause) Let me ask you about, in  
11 specific, Paragraph 7 that says, "I have determined that the  
12 medical bills incurred by these patients to ACI to date  
13 total 5,698,000."

14 MR. GRANT: Yes.

15 THE COURT: Does that figure line up with the  
16 prayer for relief of the Plaintiff?

17 MR. GRANT: I would contend that it does. The  
18 reason it's not matching the nine and seven we were talking  
19 about is because they've got one entity that's the Savannah  
20 clinics and one entity -- they sued both of them -- but it's  
21 Atlanta. You've got to total those two together. But  
22 that's the overall amount of bills which totals to the \$9  
23 million. It's 5.6 plus -- I'd have to look at another  
24 number in here. It's Number 10, Your Honor.

25 It's ACI and HWBI that are the two entities. One



1 holds the Savannah clinics and one holds Atlanta, both of  
2 whom are Defendants here, and they seek class certification  
3 with respect to both.

4 THE COURT: All right.

5 MR. GRANT: Thank you, Your Honor.

6 THE COURT: Thank you.

7 All right, Mr. Savage?

8 MR. SAVAGE: That was as well as I've seen. I'm  
9 fifty-six and I've seen a lot of it.

10 It is a little frustrating that people aren't more  
11 outraged by this behavior. I guess I'm not a legal scholar,  
12 but in reading Judge Tjoflat --

13 THE COURT: We will get to the actual behavior  
14 later. Right now we are just deciding where to adjudicate.

15 MR. SAVAGE: Right. They want to be here, and  
16 they want to be in Federal Court, and they don't want to be  
17 where all this happened.

18 They say that the amount that they received was  
19 \$3.1 million. We get removed incredibly when we trust a  
20 guy's answers -- or answer to a lawsuit in the *Toler* case  
21 that he's a Georgia resident. And then we get handcuffs put  
22 on us.

23 We have done no discovery in this case. So we're  
24 taking Harry Brown who says, "Well, I've had pleadings that  
25 I submitted in State Court," which still counts, "that says

1 I was a resident in Georgia in '06. But then I go back to  
2 Alston and Bird and I get them to sign an affidavit that's  
3 presented that I was really a resident of Florida since  
4 '01."

5 So you want to trust that and you want to have --  
6 in this case, the Plaintiffs have no ability to do any  
7 discovery because it was all shut down. We took Brown's  
8 deposition only to look at what he said in his affidavit.  
9 And, basically, he said, "I don't know anything about  
10 anything."

11 THE COURT: Do you not have diversity with Stein  
12 anyway?

13 MR. SAVAGE: But Stein is not the person who  
14 caused the removal to take place. I don't know what this  
15 discretionary stuff means. Mr. Grant was as good as I have  
16 ever seen on his feet, and I'm probably not a good lawyer to  
17 oppose those things.

18 But I do hope that in a fact situation people  
19 understand what they are permitting to do in this case and  
20 that that is repugnant.

21 I represented the guy on the back of the phone  
22 book here, and Judge Edenfield took it to the State Bar  
23 after we got done here. These things are awful. If they  
24 want to drag their client through all these appellate  
25 courts, then I guess they can saying that "We do these deals

1 where we have collections made on the side."

2 THE COURT: Again, Mr. Savage, we are going to  
3 look at remand issue right now and the law on it.

4 You heard counsel argue as to how they get to the  
5 5 million.

6 MR. SAVAGE: They say in their own affidavit that  
7 they received \$3.1 million.

8 THE COURT: Is all you request what they have  
9 received?

10 MR. SAVAGE: And my attorneys' fees at a third.  
11 I'm not in there doing a 50 percent deal. And if they've  
12 got to prove it with legal certainty, I think they've got to  
13 have actual hard damages that are outside above that 5  
14 million bucks.

15 THE COURT: Your contention would be that they  
16 have 3.1?

17 MR. SAVAGE: Times a third.

18 THE COURT: And then at most a third --

19 MR. SAVAGE: I can do that math real quick.

20 THE COURT: 4.1.

21 MR. SAVAGE: Right.

22 THE COURT: Less than five.

23 MR. SAVAGE: It is. But I want to get going one  
24 way or another.

25 THE COURT: Is there anything else that you

1 request other than that 3.1 and your one-third.

2 MR. SAVAGE: No, I'll request punitive damages. I  
3 don't know what I'm going to get, though. That's hardly a  
4 legal certainty. I don't know that I've collected punitive  
5 damages in thirty-one years of doing this. They're hardly a  
6 legal certainty.

7 THE COURT: Their standard is not a legal  
8 certainty that you would recover, but a legal certainty that  
9 what you seek is \$5 million or more.

10 MR. SAVAGE: I don't know what I'm going to get.  
11 I don't know how you could ever do that. I did like your  
12 argument which was better phrased than mine.

13 You guys are playing in a different league than  
14 mine. I am playing just from a fact issue, and I want  
15 somebody to feel what happened to these people.

16 THE COURT: That is the next phase when we look at  
17 it. We are just trying to figure out if it is here or  
18 across the street.

19 MR. SAVAGE: It's about forty miles from here.

20 THE COURT: Anything else other than what you have  
21 already argued regarding the remand?

22 MR. SAVAGE: No, I'm not pandering to the Judge.  
23 I think you're fair-minded and you're a lot smarter on these  
24 things than I am. You will figure it out and do what you  
25 think is right.

1           I want to get going on these things and let them  
2     figure out how they are going to defend the facts in the  
3     case.

4           THE COURT: Anything further from the Defense?

5           MR. GRANT: I guess I've got a freebie there. I  
6     now have proof of the third that I didn't have before.

7           So we're at \$4.1 million. Whatever \$900,000  
8     divided by 1,700 is -- that's about \$500 or \$400 in punitive  
9     damages is what it would take to be above \$5 million, if I'm  
10    doing my math with my mental calculator right in my head.

11          It's an interesting question Your Honor poses  
12    about punitive damages and legal certainty. I do get to  
13    aggregate them. That's clear. I don't know that any of us  
14    have at our fingertips how you do that other than to come up  
15    with a rational basis for saying it's not irrational to  
16    think in a case like this that each Plaintiff would be given  
17    more \$500 in punitive damages.

18          I think that, with my third bucket of the 3.1,  
19    gets us above \$5 million. But then we have the seven and  
20    the nine, and I won't belabor that any more.

21          THE COURT: All right. Counsel, thank you.

22          (Recess at 4:36 p.m.)  
23  
24  
25

## 1 CERTIFICATION

2  
3 I certify that the foregoing is a true and correct  
4 transcript of the stenographic record of the above-mentioned  
5 matter.

6  
7 *Norma Hatfield*  
8

9  
10 \_\_\_\_\_ May 8, 2012  
11 Norma Hatfield, FPR, Court Reporter  
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